

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34169/35244

STATE OF IDAHO,)	2009 Unpublished Opinion No. 431
)	
Plaintiff-Respondent,)	Filed: April 20, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
MARCUS DRAKE McGRAY,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the First Judicial District, State of Idaho, Boundary County. Hon. Lansing L. Haynes, District Judge.

Judgment of conviction and unified sentence of ten years, with four years determinate, for two counts of felony driving under the influence, affirmed in part, reversed in part and case remanded.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

SCHWARTZMAN, Judge Pro Tem,

Marcus Drake McGray appeals from the judgment of conviction and sentence entered upon his guilty plea to two counts of felony driving under the influence (DUI). We affirm in part and reverse in part and remand.

I.

FACTS AND PROCEDURE

In May 2006, McGray was arrested for DUI in Bonner County. In November 2006, he was again arrested for DUI, this time in Boundary County. The parties stipulated to transfer venue of the Bonner County case to Boundary County, and the court granted the motion. McGray pleaded guilty to one count of felony DUI, Idaho Code §§ 18-8004, 18-8005(7), in each case. He was subsequently sentenced to two concurrent unified terms of ten years with four years determinate.

Due to a change in the DUI sentencing statute that occurred between his two arrests, McGray filed an Idaho Criminal Rule 35 motion to correct an illegal sentence in the Bonner County case.¹ He also filed a Rule 35 motion for reduction of sentence in the Boundary County case. The court held a hearing on the motions, and while McGray's counsel was present, McGray was not. At the hearing, the court granted the Rule 35 motion in regard to the Bonner County conviction, finding the sentence was illegal and amending it to a unified five years with four years determinate to run concurrently with the sentence imposed in the Boundary County case. The court, however, denied McGray's Rule 35 motion for reduction of sentence in regard to the Boundary County conviction. McGray now appeals.

II.

ANALYSIS

A. Bonner County Conviction

McGray initially contends that the district court erred in correcting his illegal sentence for the Bonner County conviction--pursuant to his Rule 35 motion--without McGray being present. Specifically, he argues that because the original sentence imposed on him was invalid (because it exceeded the statutory maximum)--thus resulting in no valid sentence ever being pronounced in the Bonner County case--the district court was required to pronounce the corrected sentence in McGray's presence.

Idaho Code Section 19-2503² and Idaho Criminal Rule 43(a)³ establish that a defendant's presence at the time of sentencing is mandatory, not discretionary. In addition, our Supreme Court has held the requirement of the defendant's presence extends to when a court is correcting

¹ When initially imposing the sentences in both the Boundary and Bonner County cases, the court relied on I.C. § 18-8005, which provides for a maximum sentence of ten years for felony DUI. However, that statute did not go into effect until July 1, 2006--after McGray was arrested on the Bonner County DUI. The previous statute only provided for a five-year maximum sentence for felony DUI. Thus, the court erroneously imposed sentence in the Bonner County case.

² Idaho Code Section 19-2503 provides that "[f]or the purpose of judgment, if the conviction is for a felony, the defendant must be personally present"

³ Idaho Criminal Rule 43(a) states that "[t]he defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

an earlier illegal sentence, because when an initial sentence is invalid, sentence is not actually imposed until the trial court corrects the judgment. *Lopez v. State*, 108 Idaho 394, 396, 700 P.2d 16, 18 (1985). This is so even if the corrected sentence was very similar to the original sentence and the defendant has little or nothing to gain by being present at the resentencing hearing. *Id.* See also *State v. Money*, 109 Idaho at 757, 759, 710 P.2d 667, 669 (Ct. App. 1985). In light of these principles, the state concedes that this case must be remanded in part for resentencing in McGray's presence on the Bonner County felony DUI case. Accordingly, we order that the Bonner County case be remanded for re-imposition of sentence in the defendant's presence.

B. Boundary County Conviction

McGray also asserts, "[m]indful that his counsel below recommended the same sentence [he] received," given any view of the facts, the unified sentence of ten years, with four years determinate imposed upon his plea of guilty to felony driving under the influence in Boundary County is excessive.

Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *State v. Hedger*, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989). We will not conclude on review that the sentencing court abused its discretion unless the sentence is unreasonable under the facts of the case. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). In evaluating the reasonableness of a sentence, we consider the nature of the offense and the character of the offender, applying our well-established standards of review. See *State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). To prevail, an appellant must establish that, under any reasonable view of the facts, the sentence is excessive in light of the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *State v. Cross*, 132 Idaho 667, 671, 978 P.2d 227, 231 (1999). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 170 P.3d 387 (2007).

McGray asserts that the district court failed to adequately consider the mitigating factors present in the case, including his mental health, his substance abuse problem, his desire for treatment, and the support he enjoys from his mother. He claims that given his mental health and

alcohol abuse issues, he would benefit more from treatment than prison time. He also indicates that his mother supports him and that he could better provide for her needs if he was placed in treatment as opposed to prison.

We conclude that a review of the record does not support McGray's contention that the sentence imposed was excessive under any view of the facts. As the state points out, while McGray's arguments regarding his rehabilitation and his mother's needs may have some relevancy to his sentencing, a court is not required to assess or balance all of the sentencing goals in an equal manner. *State v. Dushkin*, 124 Idaho 184, 186, 857 P.2d 663, 665 (Ct. App. 1993). When imposing sentence here, the court noted that "the paramount issue . . . is the protection of society" and given McGray's history of seven DUI convictions (including the two instant convictions within seven months of one another) over the past twenty years, there was reason for the court to believe that prison time was necessary for the public's protection. The state points out that when arrested in the Boundary County case, McGray was found to have a very high blood alcohol level of .34⁴ and to already have an active warrant for his arrest in the Bonner County case. There was also evidence before the court that McGray has spent time in California, federal, and Idaho prisons for past DUI convictions, and that he violated parole and probation in several instances, either by committing a new DUI offense or other violations. In fact, only two months had passed between his release from an Idaho prison and his arrest for felony DUI in Bonner County. In addition, he had been given numerous opportunities to enroll in treatment programs while in prison on previous DUI convictions and on probation in Idaho, but he had failed to complete any of them. Given his extensive criminal history of the very crime he was convicted of in this case, his inability to remain law-abiding while on parole or probation, and his repeated failure to complete treatment programs, the sentence imposed in this, his seventh DUI case, was not excessive and thus not an abuse of the sentencing court's discretion. Accordingly, McGray's Boundary County judgment of conviction and sentence are affirmed.

III.

CONCLUSION

Because the illegal sentence was not corrected in McGray's presence, we remand the Bonner County case for resentencing. The sentence imposed by the court for the Boundary

⁴ Idaho Code Section 18-8004 states that it is unlawful for a person who has an alcohol concentration of .08 or more to operate a motor vehicle.

County conviction was not excessive and therefore, McGray's judgment of conviction and sentence in that case is affirmed.

Judge PERRY and Judge GRATTON **CONCUR.**